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No. [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY NEWS
Petitioner,

v

JAMES F. McCUSKER
Respondent.

ON APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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On the Petition

QUESTIONS PRESENTED

1. Was it error for the New Hampshire Supreme Court to conclude that respondent was not a public official as a matter of law when there were no facts in dispute as to respondent's official positions, duties and responsibilities?

2. Was petitioner deprived of its rights under the First and Fourteenth Amendments when the New Hampshire Supreme Court, without having had the issue presented, argued, or briefed by either party, ruled that a libel plaintiff, who had been held by the court *sua sponte* to be neither a public official nor a public figure, may recover upon a showing that libel defendant was negligent in publishing a defamatory falsehood?

As per Supreme Court Rule 28.1, please be advised that as of the date of the libel, petitioner, Valley Publishing Corp., known as Valley News, did not have an affiliate or parent company. As of the date of the filing of this brief, Valley Printing Company has become a wholly owned subsidiary of Newspapers of New Hampshire, Inc. New Hampshire, Inc. publishes the Holyoke Transcript-Telegram, Holyoke, Massachusetts and the Concord Monitor, Concord, New Hampshire, both daily newspapers. It also owns a 50% interest in Recorder Publishing Co., Inc., the publisher of the Greenfield Recorder, Greenfield, Massachusetts, a daily newspaper. In addition, Newspapers of New Hampshire, Inc. owns 3% of the common stock of Continental Cable Vision, Inc., Boston, Massachusetts.

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No.

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OCTOBER TERM, 1980

VALLEY NEWS,
Petitioner,

v

JAMES F. MCCUSKER,
Respondent.

ON APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT

Petition For Writ of Certiorari

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court is reported at 121 NH , 428 A2d 493 (1981). The order by the New Hampshire Supreme Court denying defendant's motion for a rehearing is not reported.

JURISDICTION

The judgment of the New Hampshire Supreme Court was made and entered on April 3, 1981. Petitioner's Motion to Set

Aside Finding and/or for a Rehearing was denied by the New Hampshire Supreme Court on April 21, 1981. The jurisdiction of this Court is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

This libel suit arises from an article published on October 8, 1976, by petitioner in the Valley News, a daily newspaper. The article reported that certain unnamed legislators had alleged that respondent, who was 78 years of age and a brother of the sheriff of Sullivan County, was "being paid $9,000 a year as a part-time deputy sheriff, plus an undetermined amount of money in per diem fees, despite the fact that he is barely ambulatory."[1]

Alleging that these statements were untrue and libelous, respondent brought suit in the Sullivan County Superior Court. Petitioner moved for summary judgment on the grounds that respondent was a public official, that the article related to his official conduct, that the publication was actionable only upon a showing of "actual malice," and that there were no facts that would establish such malice. Both petitioner and respondent filed supporting affidavits. The trial court found that there were

[1] The undisputed facts before the New Hampshire Supreme Court also show that during a substantial portion of respondent's term as sheriff of Sullivan County, his brother served as deputy sheriff. When respondent reached the age of 70, the mandatory retirement age for sheriffs in New Hampshire, he retired and his brother immediately became sheriff and appointed respondent as deputy sheriff.

genuine issues of fact as to whether respondent was a public official and therefore denied summary judgment.

Petitioner appealed to the New Hampshire Supreme Court. Under the provisions of NHRSA 490:9, the following questions of law were transferred by the Superior Court:

A. Was the Superior Court in error in refusing to grant Valley News' Motions for Summary Judgment either in whole or in part?

B. Is plaintiff a public official?

C. Is plaintiff a public figure?

D. Does plaintiff have an action at law based upon the pleadings?

E. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion?

Petitioner briefed and argued the following contentions:

I. Plaintiff, as deputy sheriff and superior court bailiff, was at the time of the alleged libel a "public official" and as such defendant is entitled to a summary judgment on its behalf on this issue.

II. Plaintiff, as a deputy sheriff, superior court bailiff and as one who for at least the past forty years has thrust himself into the public life of Sullivan County, was at the time of the alleged libel a "public figure" and as such defendant is entitled to a summary judgment on its behalf on this issue.

III. Summary judgment is the proper remedy in this case and the Superior Court was in error when it ruled that there were genuine issues of material fact insofar as the issue of public official was concerned.

Respondent briefed and argued the following contentions:

I. The New Hampshire Constitution entitles the plaintiff in a defamation action to a jury trial on the issue of whether he is a public official. The Constitution of the United States does not require otherwise.

II. Even if the question of whether the plaintiff is a public official or a public figure were to be decided as a matter of law or on a motion for summary judgment, the court should find that this plaintiff was neither a public official nor a public figure at the time he was defamed.

A. As a deputy sheriff and bailiff at the time of the publication, the plaintiff was not a "public official" within the meaning of *New York Times.*

B. The plaintiff was not a public figure within the meaning of *Gertz* v. *Welch.*

III. Even if the plaintiff were found to be a public official or a public figure, there would be a genuine issue of fact regarding the defendant's malice. The court cannot try issues of fact on a motion for summary judgment.

In a *per curiam* opinion, the New Hampshire Supreme Court held that respondent, as a deputy sheriff, was not a public official or a public figure as a matter of law and was entitled to a jury trial on the issues of whether he was a public official or a public figure and whether petitioner acted with "actual malice." The Court also stated as follows:

> If the plaintiff was neither a public official nor a public figure, then he need not prove knowing falsehood or recklessness. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48. Instead, he may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood. *See id.*, at 349-50.

121 NH , 428 A2d at 494. This was the first time that the New Hampshire Supreme Court had adopted this rule.

On April 8, 1981, Petitioner filed in the New Hampshire Supreme Court a Motion to Set Aside Finding on Issue Not Briefed and/or for a Rehearing. In this motion, Petitioner argued that the finding quoted above was on an issue which was not among the questions transferred and which was neither argued nor briefed by either party. Petitioner also pointed out that the resolution of this issue is of crucial importance not only to the parties involved in this particular litigation but also to all

parties actually or potentially involved in defamation litigation in New Hampshire. Defendant argued that it was inequitable and unfair to adopt a new rule for the standard of liability in defamation cases brought by private plaintiffs without the matter being fully presented, briefed and argued.

Petitioner requested that the New Hampshire Supreme Court reconsider its decision in toto and stressed the fact that petitioner and other interested parties be allowed to brief and argue the issue of what standard of liability should apply in cases brought by plaintiffs who are neither public figures nor public officials. In addition, the Monitor Publishing Co., Inc., which publishes a daily newspaper in Concord, New Hampshire, filed a motion requesting essentially the same relief as defendant had requested. Nonetheless, on April 21, 1981, defendant's motion for rehearing was denied.

STAGE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED

The first federal question raised in this appeal is whether it was error for the New Hampshire Supreme Court to conclude that respondent, a deputy sheriff, was not a public official as a matter of law when there were no facts in dispute as to respondent's official position, duties and responsibilities.

The second federal question raised in this appeal is what standard of liability should apply in a libel suit brought by a plaintiff who is neither a public official nor a public figure. This question was first raised and decided *sua sponte* by the New Hampshire Supreme Court in the written opinion it released on April 3, 1981. Neither petitioner nor respondent ever received an opportunity to brief or argue this question, either before or after the New Hampshire Supreme Court made its decision.

The third federal question raised in this appeal is whether the New Hampshire Supreme Court deprived defendant of due process when, without giving defendant an opportunity to brief or argue the issue, it ruled that a private plaintiff in a libel

action may recover compensatory damages merely upon showing that a defendant was negligent in publishing a defamatory falsehood. This question was first raised on April 8, 1981, when defendant filed a Motion to Set Aside Finding on Issue Not Briefed and/or for a Rehearing. In this motion Petitioner argued that it was inequitable and unfair for the New Hampshire Supreme Court to adopt this new rule without giving Petitioner the opportunity to brief or argue the issue. On April 21, 1981, the New Hampshire Supreme Court denied this motion.

ARGUMENT

THE RESPONDENT, A DEPUTY SHERIFF AT THE TIME OF PUBLICATION, WAS A PUBLIC OFFICIAL AS A MATTER OF LAW.

Throughout the pendency of the instant case, there has never been any factual dispute as to the official position, duties and responsibilities of respondent. Although there existed no genuine issues of fact as to respondent's service in public office since 1943, the trial court ruled that partial summary judgment on the "public official" issue was inappropriate, and this ruling was affirmed by the New Hampshire Supreme Court. This was clear error, especially in light of this Court's statement that the decision as to whether the plaintiff in a defamation action is a public official is "for the trial judge in the first instance." *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966).

The New Hampshire Supreme Court expressly recognized respondent's background as a law officer and set forth the history of his service in public office:

> The plaintiff in this case was the sheriff of Sullivan County, an elective office, from 1943 to 1966. At the time of the publication in question, he was a deputy sheriff under an appointment of his brother, then the sheriff. In his capacity as deputy sheriff, the plaintiff's duties consisted of serving process, interviewing complainants, doing investigative work, and acting as bailiff for the superior court. The plaintiff has served as president of the New Hampshire Sheriff's Association. In 1955, he organized the Sullivan County Peace Officers' Association. In the late 1930's, he was the president of the Permanent Fireman's

> Association, and in 1939 he authored a legislative bill providing for firemen's retirement. He has been active over the years in political campaigns and has spoken to service and women's clubs.

App. at 7a.

The New Hampshire Supreme Court held that the trial court was correct in holding that genuine issues of fact existed which precluded summary judgment, yet the petitioner has never contested the accuracy of the facts recited by the New Hampshire Supreme Court. While this Court has expressed some reservations as to the propriety of summary judgment *on the merits* in libel suits, *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979), it has never suggested that particular legal issues should not be decided by the court prior to trial. Where there are no facts in dispute, the trial court must "in the first instance" make the determination as to whether a libel plaintiff is a public official. *Cf. Rosenblatt* v. *Baer, supra.*

In the instant case, had the trial court or New Hampshire Supreme Court ruled on this issue, the decision would have to have been that respondent was a public official. The uncontested facts revealed that respondent had served as sheriff from 1943 to 1966. In 1966, when the respondent was forced to retire (due to state constitutional provisions governing retirement age for sheriffs), his brother was elected sheriff and the respondent was appointed deputy sheriff and was serving in that capacity at the time of the publication of which he complained. That publication raised doubts as to the respondent's ability to serve as deputy sheriff and was directly related to his official conduct in office.

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court established the constitutional rule that public official libel plaintiffs had to prove "actual malice" in order to recover. In footnote 23, the Court noted that it was not necessary, in that case, to fully delineate "how far down into the lower ranks of government employees the 'public official' designation would extend," but it did conclude that the plaintiff, a City Commissioner in charge of the police department, clearly was a public

official. In *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the plaintiff was a deputy sheriff (just as respondent herein). Without hesitation, this Court accepted the lower court's determination that a deputy sheriff had "substantial responsibility for or control over the conduct of governmental affairs" under the test established in *Rosenblatt* v. *Baer, supra*, and, therefore, was a public official. 390 U.S. at 730, n.2.

Numerous other cases throughout the country have concluded, as a matter of law, that law enforcement officers are public officials: *Meiners* v. *Moriarity*, 563 F.2d 343 (7th Cir. 1977) (Agent From Drug Abuse Law Enforcement Agency of the U.S. Department of Justice); *Gray* v. *Udevitz*, 5 Media L. Rptr. 1412 (D. Wyo. 1979) (Ex-policeman Regarding Conduct as Policeman); *Ethridge* v. *North Mississippi Communications, Inc.*, 460 F. Supp. 347 (N.D. Miss. 1978) (Undercover Narcotics Agent); *Kidder* v. *Anderson*, 354 So. 2d 1306 (La. 1978) (Police Chief); *Colombo* v. *Times-Argus Ass'n*, 380 A. 2d 80 (Vt. 1977) (Police Patrolman); *Ammerman* v. *Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P. 2d 1258 (1977) (Deputy Sheriff); *McCarney* v. *Des Moines Register & Tribune Co.*, 239 N.W. 2d 152 (Iowa 1976) (Police Captain). And the New Hampshire courts themselves, in different contexts, have recognized that deputy sheriffs are public officials:

> We think that it must be true that sheriffs and their deputies, *like other public officers*, are under a general duty to exercise reasonable skill and diligence in performance of their *official duties* . . . The official *duties* of *sheriffs* and their *deputies* are numerous and diversified . . .

Demers v. *Bisbee*, 106 NH 354 at 356, 211 A. 2d 416 (1965) (emphasis added).

In light of the above cases and the undisputed facts in the instant case, the trial court, when presented with a motion for summary judgment on the public official issue, had an affirmative duty to render a ruling that the respondent was a public official, at least in regard to the allegedly defamatory article which dealt only with his fitness for office and his official conduct.

THE NEW HAMPSHIRE SUPREME COURT ERRED IN *SUA SPONTE* HOLDING THAT A NEGLIGENCE STANDARD WAS APPLICABLE IN A NON PUBLIC OFFICIAL/ PUBLIC FIGURE LIBEL CASE

The decision by the New Hampshire Supreme Court should be reviewed because it erroneously holds that a private plaintiff in a libel action may recover damages merely upon showing that the defendant was negligent in publishing a defamatory falsehood. This conclusion was reached without analysis of any underlying policy considerations and with reference to only one authority, the decision by this Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, this Court held by a five to four majority that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*, 418 U.S. at 347.[2]

---

[2] Several states have adopted a negligence standard in libel actions brought by private individuals. *See, e.g., Peagler* v. *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P2d 1216 (1977); *Cahill* v. *Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 543 P2d 1356 (1975); *Martin* v. *Griffin Television, Inc.*, 549 P2d 85 (Okla. 1976). Several others have chosen to apply the "actual malice" standard. *See, e.g., Peisner* v. *Detroit Free Press*, 82 Mich. App. 153, 266 NW2d 693 (1978); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P2d 450, *cert. denied* 423 U.S. 1025 (1975). In *Walker*, the Colorado Supreme Court said that it adopted the "actual malice" standard:

> simply from [its] conclusion that a simple negligence rule would cause such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions and that this insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation injured private individual.

188 Colo. at 99, 538 P2d at 458.

New York has adopted a third standard. In *Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 NY2d 196, 199, 379 NYS2d 61, 341 NE2d 569 (1975), the New York Court of Appeals held that "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover" upon establishing "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

For several reasons, this Court should now overturn this holding and instead require that civil libel plaintiffs should be required to prove actual malice, *see New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), in actions concerning media reports of the involvement of private individuals in events of public or general interest. *See Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz, supra*, 418 U.S. at 361 (Brennan, J., dissenting). As Mr. Justice Brennan stated in his dissenting opinion in *Gertz*, 418 U.S. at 366-67:

> Adoption, by many States, of a reasonable-care standard in cases where private individuals are involved in matters of public interest—the probable result of today's decision—will . . . lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable-care standard is "elusive," *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967); it saddles the press with "the intolerable burden of guessing how the jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Ibid.* Under a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the news-gathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. *See* The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3,228 (1971). Moreover, in contrast to proof by clear and convincing evidence required under the *New York Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.
>
> 'In the normal civil suit where [the preponderance of the evidence] standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroenous verdict in plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as

> most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.' *Rosenbloom*, 403 U.S. at 50.
>
> And, most hazardous, the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into 'an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks . . ." which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.' *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 277 (1971).

Gertz was a five to four decision by this Court. The deciding vote in favor of the majority was cast by Mr. Justice Blackmun, whose primary rationale was as follows:

> By removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

Gertz, supra, 418 U.S. at 354 (Blackmun, J., concurring).

Petitioner submits that the elimination of punitive damages in libel cases involving mere negligence does not diminish the motivation for self-censorship because the specter of actual damages is a sufficient motive for self-censorship in such cases. Judges and juries all across our country have been assessing extravagant "actual" damages in libel actions against media defendants. Such verdicts have indeed had a "killing effect" on the functioning of responsible journalism.

Thus, the adoption of a "negligence" or "reasonable-care" standard in libel actions is so lenient and vague that it has resulted and will continue to result in intolerable self-censorship by responsible journalists. This Court should therefore take this opportunity to over-rule its decision in *Gertz*. Petitioner submits that this Court should instead adopt the standard endorsed by Mr. Justice Brennan in his plurality opinion in *Rosenbloom* and his dissenting opinion in *Gertz*. Under this standard, states would have to "apply the *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest." *Gertz, supra*, 430 U.S. at 361 (Brennan, J., dissenting).

The ruling by the New Hampshire Supreme Court that private plaintiffs "may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood," 121 NH at , 428 A2d at 494, was on an issue which had not been among the questions transferred and which had been neither argued nor briefed by either party. By resolving this crucial issue in so summary a fashion, the New Hampshire Supreme Court deprived petitioner of due process.

The application of the prohibition against any state deprivation of life, liberty, or property without due process of law requires a two-stage analysis. First, this Court must ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property." Second, if protected interests are implicated, this Court must then decide what procedures constitute "due process of law." *Ingraham* v. *Wright*, 430 U.S. 651 (1977). *See also Meachum* v. *Fano*, 427 U.S. 215, *rehearing denied* 429 U.S. 873 (1976).

In this case, petitioner Valley News certainly has protected liberty and property interests in minimizing its potential liability for defamatory falsehoods when publishing news stories on matters of public interest. The standard of liability applicable in libel actions against the petitioner will have wide-ranging effects on every aspect of its operation, from its operating

procedure to its editorial policy to its financing and insurance coverage. The right to follow a chosen profession free from unreasonable governmental interference falls within the meaning of the "liberty" and "property" concepts of the Fourteenth Amendment. *U.S.* v. *Robel*, 389 U.S. 258 (1967); *Greene* v. *McElroy*, 360 U.S. 474 (1959). The meanings of "liberty" and "property" are broad indeed; they are left to gather meaning from experience and they relate to the whole domain of social and economic facts. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

Since there are liberty and property interests at stake here, due process requires that any adjudication be preceded by notice and an opportunity to be heard appropriate to the nature of the case. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Mullane*, *supra*. The proceeding or hearing must be appropriate, fair, adequate, and such as is practicable or reasonable in the particular case. *See, e.g., Boddie* v. *Connecticut*, 401 U.S. 371 (1971). In the instant case, the petitioner was deprived both of notice and the opportunity to be heard prior to the New Hampshire Supreme Courts' decision as to the standard of liability to be applied in private individual libel cases.

CONCLUSION

Respondent is without question a public official. The facts, as before the New Hampshire Supreme Court and cited in its opinion, regarding his position within the governmental framework of New Hampshire are undisputed. The Court below fell into serious error in refusing to find respondent a public official as a matter of law. A deprivation of petitioner's First Amendment rights has occurred as a result of the refusal to find respondent a public official.

In the case at bar, petitioner was given absolutely no notice or opportunity to be heard on the crucial issue concerning the appropriate standard of liability prior to the New Hampshire Supreme Court's adoption of a negligence standard in libel cases involving private plaintiffs. The issue was neither briefed nor argued by any of the parties. Moreover, it was not one of the issues transferred by the Sullivan County Superior Court. The New Hampshire Supreme Court thereby violated petitioner's Fourteenth Amendment right to due process.

Respectfully submitted,

VALLEY NEWS
By its Attorneys

BELL, FALK & NORTON
A Professional Association

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ERNEST L. BELL, III

and

By EDWARD DREW CHENEY
EDWARD DREW CHENEY

APPENDIX

APPENDIX

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THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS. **SUPERIOR COURT**
CIVIL #8591 **FEBRUARY TERM, 1980**

James F. McCusker

vs

Valley News

INTERLOCUTORY APPEAL FROM RULING

STATEMENT OF THE CASE

This is an action entitled "In a plea of trespass and libel . . ." wherein plaintiff, a deputy sheriff, bailiff and former high sheriff, sued a newspaper for certain statements regarding his health and earnings published in a report on his brother's political campaign. A copy of the article in question as published in the Valley News on October 8, 1976, is attached.

Defendant filed a Motion for Summary Judgment wherein it requested that based upon plaintiff's status as a public official and/or a public figure it was entitled to a judgment in its favor. Plaintiff countered with an affidavit and a statement of a Superior Court justice [not under oath]. After hearing, the Superior Court denied defendant's request and further stated that the "affidavits submitted disclose a genuine issue of material fact which requires a formal trial on the merits . . ." Defendant timely excepted.

STATEMENT OF THE FACTS

The article in question is attached and is self-explanatory. Plaintiff was at the time a deputy sheriff, bailiff and had been high sheriff of Sullivan County. The article attributes certain statements about his health and earnings to certain members of the county delegation. Plaintiff claims damages as a result of these statements.

QUESTIONS OF LAW

The following questions of law are transferred in accordance with RSA 491:17, Supreme Court Rules 8 and 9 and Superior Court Rule 79:

A. Was the Superior Court in error in refusing to grant Valley News' Motion for Summary Judgment either in whole or in part?

B. Is plaintiff a public official?

C. Is plaintiff a public figure?

D. Does plaintiff have an action at law based upon the pleadings?

E. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion?

REASONS FOR GRANTING AN INTERLOCUTORY APPEAL

The Court's attention is respectfully directed to the attached Valley News' Memorandum of Law filed in the Superior Court that sets forth in detail its position upon the basic question here as to whether plaintiff is a public official and/or a public figure.

It is essential that this determination be made prior to the start of trial in this matter. As can be appreciated from the ruling in *Baer* v. *Rosenblatt*, 108 NH 368 (1967) that the Supreme Court has not passed upon the use of the summary judgment procedure in newspaper libel cases. *Rosenblatt* was decided in 1967 and the summary judgment statute (RSA 491:8-a) was expanded in 1973 to cover situations such as the one at bar.

The consideration of this question by the Supreme Court would serve to simplify the issues at trial and clarify issues of general importance in the administration of justice in the field of libel law. Also to be determined in this matter is whether or not plaintiff's affidavit was sufficient to meet the challenge presented by defendant's motion.

EXHIBITS ATTACHED

1. Plaintiff's writ.
2. Valley News article of October 8, 1976.
3. Defendant's Motion for Summary Judgment and Affidavit.
4. Plaintiff's Reply with Affidavit and Attachment.
5. Defendant's Memorandum of Law.
6. Court's Order, April 9, 1980.

/s/ ROBERT H. TEMPLE

Presiding Justice
4-30-80

Sullivan
No. 80-197

James F. McCusker

v.

Valley News

April 3, 1981

Brown & Nixon P. A., of Manchester, (*Stanley M. Brown & a.* on the brief and *Mr. Brown* orally), for the plaintiff.

Bell, Falk & Norton, of Keene (*Ernest L. Bell, III*, on the brief and orally), for the defendant.

PER CURIAM. The issue in this libel case is whether the trial court erred in denying the defendant's motion for summary judgment. We uphold the trial court.

On October 8, 1976, the defendant published an article written by one of its staff writers, Jan Slusmon, who reported that certain unnamed legislators had alleged that the plaintiff, who at that time was 78 and the brother of the then sheriff of Sullivan County, was "being paid $9,000 a year as a part-time deputy sheriff, plus an undetermined amount of money in per diem fees, despite the fact that he is barely ambulatory."

The plaintiff brought suit alleging that the statements were untrue and libelous. The defendant moved for summary judgment, on the grounds that the plaintiff is, and has been since 1944, a public official, that the article related to his official conduct, that the publication is actionable only on a showing of "actual malice," and that there are no facts that would establish such malice. Jan Slusmon also filed a supporting affidavit claiming that he had accurately reported the legislators' statements and that he had no reason to doubt that the statements were substantially true. The Trial Court (*Temple, J.*) found that there were genuine issues of fact as to whether the plaintiff was a public official and as to whether proof of "actual malice"

was required in order for the plaintiff to recover, and therefore denied summary judgment. The defendant appealed.

If the plaintiff was a public official or a public figure, then, in order to recover for injury to reputation, he would have to prove not only that the defamatory statement was false but also that the defendant published it with knowledge that it was false or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 42 (1974); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 162-65 (1967) (*Warren*, C.J., concurring); *New York Times Co.* v. *Sullivan*, 387 U.S. 254, 279-80 (1964). If the plaintiff was neither a public official nor a public figure, then he need not prove knowing falsehood or recklessness. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48. Instead, he may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood. *See id.* at 349-50.

Not all government employees are public officials within the meaning of *New York Times Co.* v. *Sullivan*. In order to show that the plaintiff is a public official under *New York Times*, the defendant must prove that the plaintiff's "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . ." *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966). In the *Rosenblatt* case, the United States Supreme Court "remarked" that the decision as to whether the plaintiff in a defamation action is a public official is "for the trial judge in the first instance." *Id.* at 88. However, in *Baer* v. *Rosenblatt*, 108 N.H. 368, 370-71, 237 A.2d 130, 132-33 (1967), decided after remanded from the Supreme Court, we held that the Constitution of this State, N.H. CONST. pt. I, arts. 14 and 20, entitled the plaintiff to a jury trial on this issue with proper instructions from the court. We reinforced this position in *Thomson* v. *Cash*, 119 N.H. 371, 378, 402 A.2d 651, 656 (1979).

In remarking that the issue of whether an individual is a public official was in the first instance for the trial judge, the

United States Supreme Court was concerned with the possibility that a jury, in making the determination, would be influenced by its view of the defendant and his publication. *See Rosenblatt* v. *Baer*, 383 U.S. at 88 n. 15. This concern is not unlike that expressed in *Jackson* v. *Denno*, 378 U.S. 368 (1964), with respect to the determination of the voluntariness of confessions. We are of the opinion, however, that this concern can be dispelled by careful instructions to the jury and by the use of a special verdict on the public official issue. *See Baer* v. *Rosenblatt*, 108 N.H. at 371, 237 A.2d at 133.

Whether this issue shou be "tried separately and in advance of other issues" is a matter best left to the sound discretion of the trial court. *Id.*

What we have said with regard to the public official issue also applies to the issue of whether the plaintiff was a public figure as defined in such cases as *Wolston* v. *Reader's Digest Assn. Inc.*, 443 U.S. 157, 164 (1979); *Time, Inc.* v. *Firestone*, 424 U.S. 448, 453 (1976); and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 344-47.

The plaintiff in this case was the sheriff of Sullivan County, an elective office, from 1943 to 1966. At the time of the publication in question, he was a deputy sheriff under an appointment of his brother, then the sheriff. In his capacity as deputy sheriff, the plaintiff's duties consisted of serving process, interviewing complainants, doing investigative work, and acting as bailiff for the superior court. The plaintiff has served as president of the New Hampshire Sheriff's Association. In 1955, he organized the Sullivan County Peace Officers' Association. In the late 1930's, he was the president of the Permanent Fireman's Association, and in 1939 he authored a legislative bill providing for firemen's retirement. He has been active over the years in political campaigns and has spoken to service and women's clubs.

The plaintiff's position as a deputy sheriff does not place him in the category of a public official as a matter of law. Neither can we say that the plaintiff was a public figure as a matter of law. The trial court was correct in holding that

genuine issues of fact existed which required the denial of summary judgment for the defendant.

We also agree with the plaintiff that, even assuming that the *New York Times* test of "actual malice" does apply, there are genuine issues of fact in this case. Even if there may be cases in which summary judgment would be appropriate, this is not one of them. *See Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n. 9 (1979); *Thomson* v. *Cash*, 119 N.H. 371, 402 A.2d 651 (1979).

Exceptions overruled; remanded.

GRIMES, C. J., did not sit.

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS. 1981 TERM
APRIL SESSION

SUPREME COURT
#80-197

James F. McCusker

v.

Valley News

DEFENDANT VALLEY NEWS' MOTION TO SET ASIDE FINDING ON ISSUE NOT BRIEFED AND/OR FOR A REHEARING

NOW COMES defendant Valley News and says:

1. This is a libel case by a deputy sheriff against a daily newspaper.

2. On April 3, 1981, this Court decided an Interlocutory Appeal in which the questions of law transferred by the Superior Court were:

A. Was the Superior Court in error in refusing to grant Valley News' Motions for Summary Judgment either in whole or in part?

B. Is plaintiff a public official?

C. Is plaintiff a public figure?

D. Does plaintiff have an action at law based upon the pleadings?

E. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion? (p2 IA)

3. Plaintiff briefed and argued the following questions presented for review:

1. Does the New Hampshire Constitution entitle the plaintiff to the decision of a jury on the question of whether he is a public official?

2. As a deputy sheriff and bailiff at the time of the publication, was the plaintiff a "public official" within the meaning of *New York Times* v. *Sullivan*?

3. Is the plaintiff a public figure either for all purposes or for the limited purpose of the publication in question?

4. Was the Superior Court in error in refusing to grant the Motion for Summary Judgment either in whole or in part? (pl PLB)

4. Defendant briefed the following "Questions Presented for Review":

1. Is plaintiff a public official?

2. Is plaintiff a public figure?

3. Does plaintiff have an action at law based upon the pleadings?

4. Was plaintiff's affidavit sufficient to support the Court's denial of defendant's motion?

5. Was the Superior Court in error in refusing to grant Valley News' Motions for Summary Judgment either in whole or in part? (pl DB)

5. The defendant's arguments in this matter were as follows:

I. Plaintiff, as a deputy sheriff and superior court bailiff, was at the time of the alleged libel a "public official" and as such defendant is entitled to a summary judgment on its behalf on this issue.

II. Plaintiff, as a deputy sheriff, superior court bailiff and as one who for at least the past forty years has thrust himself into the public life of Sullivan County was at the time of the alleged libel a "public figure" and as such defendant is entitled to a summary judgment on its behalf on this issue.

III. Summary judgment is the proper remedy in this case and the Superior Court was in error when it ruled that there were genuine issues of material fact insofar as the issue of public official was concerned. (pl BD)

6. On Page 2 of the April 3, 1981, slip opinion, the Court rules:

> If the plaintiff was neither a public official nor a public figure, then he need not prove knowing falsehood or recklessness. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48. Instead, he may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood. *See, Id.*, at 349-50.

7. The findings set forth in paragraph 6 were not argued or briefed by either party before this court and were not in the questions transferred.

8. The matters set forth in paragraph 6 have not been decided by this Court since the decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 343-48 (1974). These issues are of considerable importance to not only the parties involved in this particular litigation but to all parties involved in defamation litigation in this state.

9. It is inequitable and unfair not only to the defendant in this case but also to all those involved in any sort of public information work to have the rule of simple negligence adopted in defamation cases without the matter being fully presented, briefed, and argued to this Court.

10. Defendant, and any *amicus curiae* that are interested, should be allowed the right to brief and argue the point set

forth in paragraph 6 in the event that the Court does not strike the material set forth in paragraph 6.

WHEREFORE, defendant Valley News moves:

A. The decision of April 3, 1981, be reconsidered;

B. The material set forth in paragraph 6 above be stricken from the decree in this matter;

C. Or in the alternative, the issue of the standard of care in a nonpublic official, nonpublic figure defamatory falsehood (libel) case be reconsidered and the defendant, and others, if interested, be allowed to brief and argue this particular point; and

D. For such other relief as may be equitable and just.

Respectfully submitted,

VALLEY NEWS
By its Attorneys

BELL, FALK & NORTON
A Professional Association

/s/ By ERNEST L. BELL, III
Ernest L. Bell, III

I hereby certify that a copy of the within motion was forwarded to Stanley M. Brown, Esq., this 8th day of April, 1981.

/s/ ERNEST L. BELL, III
Ernest L. Bell, III

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

1981 TERM
APRIL SESSION

No. 80-197

James F. McCusker

v.

Valley News

MOTION

NOW COMES Monitor Publishing Co., Inc. (hereinafter "Monitor Publishing"), publisher of the *Concord Monitor*, a daily newspaper having its principal circulation in the Greater Concord, New Hampshire area, and respectfully moves the Court pursuant to Rule 21 of the *Rules of the Supreme Court* to reconsider its decision in *McCusker* v. *Valley News* (decided April 3, 1981) as follows:

(1) Monitor Publishing has requested and been provided with a copy of the motion for rehearing filed by the *Valley News* in this action.

(2) As the publisher of a daily newspaper, Monitor Publishing is a potential defendant in libel actions instituted by private figures. It, therefore, has a real and substantial interest in the standard of care applicable to a publisher of an allegedly defamatory falsehood in a private figure libel action. Such standard of care also is of urgent and grave concern to members of the press who publish or broadcast in this state.

(3) Based upon the motion for rehearing filed by the *Valley News*, Monitor Publishing understands that in the interlocutory appeal of this action neither party briefed or argued the question of the appropriate standard of care in a private figure libel action.

WHEREFORE, Monitor Publishing Co., Inc. joins the *Valley News* and respectfully requests the Court either to delete the last sentence of the first full paragraph of page 2 of the Slip Opinion or, alternatively, to grant the *Valley News*' motion for rehearing, and permit the parties and *amicus curiae* parties to file briefs and argue this important question of law; and for such other relief as may be just.

Respectfully submitted,

MONITOR PUBLISHING CO., INC.
By its Attorneys,

ORR AND RENO, P. A.
95 North Main Street
P. O. Box 709
Concord, New Hampshire 03301

/s/ By WILLIAM L. CHAPMAN
William L. Chapman

Dated: April 13, 1981

CERTIFICATE OF SERVICE

I, William L. Chapman, Esquire, hereby certify that on this 13th day of April, 1981, I have caused a copy of the foregoing Motion to be mailed to Ernest L. Bell, III, Esquire, attorney for Valley News, and Stanley M. Brown, Esquire, attorney for James F. McCusker.

/s/ WILLIAM L. CHAPMAN
William L. Chapman

SUPERIOR COURT OF NEW HAMPSHIRE

SULLIVAN COUNTY

May 7, 1981

Re: 8591 *McCusker* v. *Valley News*

Gentlemen:

Please be advised that on May 7, 1981 the N.H. Supreme Court made the following order relative to the above-captioned case:

4-3-81 Exceptions overruled; remanded.

4-21-81 Motion for rehearing denied.

A certificate of said order dated May 4, 1981 was filed in this office on May 7, 1981.

Very truly yours,

/s/ HENRY SHAHEEN

Henry Shaheen
Clerk

Office-Supreme Court, U.S.
FILED
AUG 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-122

VALLEY NEWS
Petitioner,

v.

James F. McCusker,
Respondent

ON APPEAL FROM THE NEW HAMPSHIRE SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANLEY M. BROWN, ESQ.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-122

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STATUTE

28 U.S.C.A. Supreme Court Rule 17.1 8,9

NEW HAMPSHIRE CONSTITUTION

New Hampshire Constitution, Part 1, Articles 14 and 20 3

STATEMENT OF THE CASE

The following is deemed necessary to correct inaccuracies and ommisions in the Petitioner's Statement of the Case:

Wholly contrary to the Petitioner's assertion that the standard of proof for a private individual was not addressed by the respondent in its brief, the entire thrust and import of plaintiff's brief was that the plaintiff below should not be held to the imposing burden placed upon a public official or public figure, but rather to be left to the lesser standard of proof for a private individual.

In fact, the respondent set forth the following in his brief below:

> According to the holding of *Gertz*, the level of constitutional protection to be afforded defamatory speech now depends upon whether the plaintiff is a public or private person, and not upon the subject matter of the speech. A public figure has greater access to the media and is therefore more able to contradict criticism and expose falsehood. Furthermore, a public figure voluntarily exposes himself to injury from falsehood by the media attention he commands. A private individual, on the other hand, neither has access to the media to counteract false statements nor assumes the risk of publicity. The state's interest in compensating private individuals for harm inflicted by defamatory falsehood is thus correspondingly greater.
>
> [S]o long as they do not impose liability without fault, the States may define for themselves the

> appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual.
>
> 418 U.S. at 347. See, e.g., *Stone* v. *Essex County Newspaper, Inc.,* 367 Mass. 849, 330 N.E. 2d 161 (1975). A plaintiff who is a "public figure", however, is subject to the more onerous burden of proof established by *New York Times.*

The defendant's decision to ignore this issue and that portion of plaintiff's brief referred to, is not justification to attack the opinion of the New Hampshire Supreme Court.

It was well within the authority and discretion of the Court, and necessary to clarify the opinion of the Court, to include reference to the necessary burden for those persons determined to be neither public officials nor public figures.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS CORRECTLY DECIDED.

The Petitioner first argues that it was error for the New Hampshire Supreme Court to affirm the Superior Court's determination that summary judgement on the public official issue was inappropriate, in this case, because there were factual issues presented to be determined by the jury. The Petitioner claims this was "clear error" especially in light of this Court's statement in *Rosenblatt v. Baer,* 383 U.S. 75, 88 (1966), that the decision as to whether the plaintiff in a defamation action is a public official is for the trial judge in the first instance.

The New Hampshire Supreme Court, in the present case, discussed the above cited statement of this Court, yet stated:

> "[H]owever, in *Baer* v. *Rosenblatt*, 108 N.H. 368 (1967), decided after remand from the Supreme Court, we held that the Constitution of this State, N.H. Const. Pt. I, Arts. 14 and 20, entitled the plaintiff to a jury trial on this issue with proper instructions from the Court. We reinforced this position in *Thomson* v. *Cash*, *119 N.H. 371 (1979)*."
>
> *McCusker* v. *Valley News* 121 N.H. (1981).

In this case, the New Hampshire Supreme Court recognized that this Court, in remarking that the issue of whether an individual is a public official was in the first instance for the trial judge, "was concerned with the possibility that a jury, in making the determination would be influenced by its view of the defendant and his publication." The Court ruled, however, that since the issue is factual, it is required to be submitted for jury determination under the New Hampshire Constitution and that careful instructions to the jury and use of a special verdict on the public official issue would dispel the concerns of this Court. *Id.*

The Petitioner cites *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), and claims that "without hesitation, this Court accepted the lower court determination that a deputy sheriff. . . was a public official." A proper reading of this Court's language in the cited case shows:

> "*For purposes of this case, we accept the determination of the Louisiana Courts that. . . Thompson was a public official.*" (Emphasis added).

The Louisiana Court had concluded, after considering its state law, that a deputy sheriff has substantial responsibility for, or control, over, the conduct of governmental affairs at least where law enforcement and police functions are concerned. 250 La. at 422, 196 So. 2d at 261. This Court was clear in that it accepted the determination made by this particular state as to whether a person was a public official. This Court did not adopt any standard of its own as to whether all deputy sheriffs, in all instances would be deemed public officials for the purposes of the present case.

The Petitioner also incorrectly states that the New Hampshire Courts recognize that deputy sheriffs are public officials, and cites *Demers* v. *Bisbee*, 106 N.H. 354 at 356 (1965), which held, "we think that it must be true that sheriffs and their deputies, like other public officers, are under a general duty to exercise reasonable skills and diligence in performance of their official duties. . .". In that case, a deputy sheriff failed to properly serve process on a party, and as a result of this failure, damages resulted to another party. The Court held that the deputy sheriff may be held to answer to persons sustaining special damage as a result. At no time does this case discuss or attempt to discuss whether a deputy sheriff, or any other person employed by a public agency, is a public official for the purposes of defamation cases, and to so indicate to this Court is misleading.

In the present case, the New Hampshire Supreme Court has precisely expressed its past and present holding that the plaintiff-respondent is entitled to a jury trial in the first instance, with proper instructions from the court, as to whether he was a public official at the time of this libel.

II. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT IS CONSISTENT WITH DECISIONS OF THIS COURT, THE CIRCUIT COURTS AND THE STATE COURTS.

The Petitioner has claimed that the New Hampshire Supreme Court has erroneously adopted a negligence standard of recovery. The Petitioner claims that the New Hampshire Supreme Court adopted this standard with reference only to this Court's holding in *Gertz* v. *Welch*, 418 U.S. 323 (1974). *Gertz* allows the individual states to impose liability for defamation under any standard except strict liability. The Petitioner cites Justice Brennan's dissenting opinion in *Gertz*, claiming that adoption of "a reasonable-care standard in cases where private individuals are involved in matters of public interest—the probable result of today's decision—will. . . lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication." However, in the States which have adopted a negligence standard, the courts have expressed overriding state concerns which counterbalance those of concern to Justice Brennan.

In *Taskett* v. *King Broadcasting Co.*, 86 Wash. 2d 439, 546 P. 2d 81 (1976), the Court said:

> "It has been argued by the defense that to reduce the standard first enunciated in *New York Times*, and subsequently adopted in both *Rosenbloom* and *Miller*, (*Miller* v. *Argus Publishing Co.*, 79 Wash. 2d 816, 490 P. 2d 101) will have a 'chilling effect' upon the press and, therefore, result in self-censorship. We find this contention to be without merit. It is true that greater caution must

> now be exercised where the subject of a publication is a private person, yet such a rule is totally justifiable in light of the State's overriding interest in providing a realistic remedy to an otherwise helpless private citizen. It cannot be gainsaid that any social value derived is 'clearly outweighed by the social interest in order and moraltiy.' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 Sup. Ct. 766, 799, 86 L. Ed. 1031 (1942)."

In *Troman* v. *Wood*, 62 Ill. 2d 184, 340 N.E. 2d. 292 (1976), the Illinois Supreme Court said:

> "The defendant concedes that the Federal Constitution does not require Illinois to apply the *New York Times* standard as a matter of State policy. The arguments in support of that position lean heavily on the adverse effect of freedom of the press which would supposedly follow in the absence of the actual malice standard. But, the extent to which liability for defamation adversely affects freedom of speech and press is a Federal constitutional question, and it has been authoritatively determined by the Supreme Court that a standard of liability less rigorous than that of actual malice will not impermissibly abridge that freedom."

And the Arizona Supreme Court, in *Peagler* v. *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977), said:

"In *Gertz*, the Court said:

> 'The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the state to abandon this purpose. . . ' 418 U.S. at 341.
>
> Nor do we think a state should be so solicitous of a publisher of defamatory falsehood that he is virtually insulated from the consequences of his wrong."

The State courts cited above, along with those of many other states, have adopted this negligence standard as a means to protect private individuals from the adverse effects of defamation. The New Hampshire Supreme Court, concerned with the constitutional right in New Hampshire to a remedy to injury to character has likewise adopted this negligence standard.

The decision by this Court in *Gertz* to allow the states to adopt their own appropriate standard of liability, has been reaffirmed and followed by this Court and the circuit courts. See, *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976); *Wolston* v. *Readers Digest*, 443 U.S. 157 (1979); *Steaks Unlimited* v. *Deaner*, 623 F. 2d 272 (3rd Cir. 1980); *Brewer* v. *Memphis Pub. Co., Inc.*, 626 F.2d 1247 (5th Cir. 1980). In *Brewer*, it was stated, ". . . as the prior panel of this Court held *Gertz* prohibits the states from allowing liability without fault, from 'presuming' fault. *Brewer, supra* at 702. *The overwhelming majority of state courts responding to this mandate have adopted negligence as the rule of liability.*" (Emphasis added).

The New Hampshire Supreme Court has accepted the rationale and the negligence standard permitted by this Court, and adopted by the majority of jurisdictions.

III. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT OR SPECIAL ISSUE FOR WHICH REVIEW SHOULD BE GRANTED.

This Court, in *Layne and Bowler Corp.* v. *Western Well Workers*, 261 U.S. 387, 393 (1923) stated a fundamental principle regarding review by Writ of Certiorari:

> ". . . it is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . ."

Supreme Court Rule 17.1 embodies this same principle by stating that review is " not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

The New Hampshire Supreme Court noted in its decision in *Rosenblatt* v. *Baer, supra*, after remand of that case by this Court, that this issue of whether or not a person is a public official is one of fact required by the New Hampshire Constitution to be tried by jury, and is not a matter of law. Therefore, the Petitioner's argument that the plaintiff-respondent was a public official as a matter of law is without merit. The resolution of this issue, as it applies to this case, has yet to be tried before a jury in a New Hampshire trial court.

The Petitioner's second argument that the New Hampshire Supreme Court erred in adopting a negligence standard in a non-public official/public figure libel case is likewise without merit. This issue has been fully considered and explained by this Court, and *Gertz* expressly permits the states to determine the standards to be applied in cases involving private individuals. The New Hampshire Supreme Court's holding is in accordance with *Gertz*, and therefore, Petitioner's second argument does not bring this case within the requirements of Supreme Court Rule 17.1.

CONCLUSION

This case does not present conflict between decisions of this Court and the New Hampshire Supreme Court. Rather, the law in this area has finally been carefully, precisely, and clearly set forth by this Court in *Gertz*, and the New Hampshire Supreme Court is merely implementing that law. The case does not present the necessary requisites to warrant a review on Writ of Certiorari, and Petitioner's request should be denied.

With respect to the Petitioner's argument that it was denied due process as to the setting of this standard, this issue was briefed by the Respondent in this case. The Petitioner chose to ignore it, and the Petitioner now has no standing to complain.

RESPECTIVELY SUBMITTED

JAMES F. MCCUSKER
BY HIS ATTORNEYS
BROWN AND NIXON PROFESSIONAL ASSOCIATION
STANLEY M. BROWN, ESQUIRE
MARK A. ABRAMSON, ESQUIRE

MOTION FILED
AUG 18 1981

No. 81-122

IN THE

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OCTOBER TERM, 1981

VALLEY NEWS

Petitioner,

v

JAMES F. McCUSKER

Respondent.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS FOR LEAVE TO FILE *BRIEF AMICI CURIAE* AND *BRIEF AMICI CURIAE*

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No. 81-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VALLEY NEWS

Petitioner,

v

JAMES F. McCUSKER

Respondent.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") respectfully move this Court for leave to file the accompanying Brief Amici Curiae in support of the Petition for Writ of Certiorari filed herein. Although the attorneys for Petitioner have consented to ANPA's and ASNE's filing of a brief amici curiae, the Respondent has withheld his consent to such a filing.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. The *Valley News* and seven other

newspapers published in various parts of New Hampshire hold membership in ANPA.

Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. The Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors (hereinafter "ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The decision of the New Hampshire Supreme Court in the instant case, while possibly an aberration, represents a serious departure from established libel jurisprudence and, therefore, is of significant interest to the members of ANPA and ASNE, all of whom cherish their right and their duty to inform the public on political matters.

No decision of this Court has ever suggested that the determination of the public official/public figure issue in a libel case might properly be made by a jury, even when this Court has disagreed with the conclusion of a lower court concerning the "voluntary" nature of a defamation plaintiff's involvement in a public controversy. *See, e.g., Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979). On the contrary, this Court uniformly has treated the question as a legal issue. *See, Rosenblatt v. Baer*, 383 U.S. 75 (1966) (Public official issue is for the trial judge). Such uniform treatment strongly suggests that this Court considers such treatment to be an element of the

"strategic protection" provided by the First Amendment in defamation actions. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

Yet, in the instant case, the New Hampshire Supreme Court held that the Respondent's status as a public official was a question for the jury. While, as noted, this decision may be an aberration, it is not the only state court decision which recently has so held. See *Penthouse International Ltd. v. Rancho La Costa, Inc.*, 106 Cal. App. 3d 646 (Cal. Ct. App. 1980), cert. denied, ____ U.S. ____, 67 L.Ed2d 326 (1981).

By holding that the public official determination is a matter for the jury, the New Hampshire Supreme Court has made it impossible for any media defendant in New Hampshire to obtain a pre-trial adjudication of that particular issue and, thereby, has inordinately added to the discovery and trial burdens of both sides in libel litigation.

Obtaining a pre-trial adjudication of the applicability of the First Amendment privilege is, of course, vitally important to media defendants. An early determination of the privilege issue defines the parameters of both the trial of the action—*i.e.*, whether the defendants will have the considerable protection of the *New York Times* actual malice standard—and pre-trial discovery. Indeed, it is necessary to define those parameters at an early stage of litigation in order to enable the trial judge to provide the type of sensitive control over pre-trial discovery issues which this Court has encouraged. See *Herbert v. Lando*, 441 U.S. 153 (1979).

Moreover, in the absence of the availability of pre-trial adjudication of a libel plaintiff's "status", the standard of liability (i.e., "actual malice" or a "private individual" standard) to be applied at trial will be unknown. This will require both plaintiffs and defendants to prepare and present much lengthier cases and much more evidence than would be necessary if the applicable standard of liability were known. In essence, each side will have to present two complete cases: one focusing on public official/public figure status and one focusing on private individual status.

Because of the burdens entailed in libel litigation wherein the plaintiff's "status" is left to the jury and because the New Hampshire Supreme Court's decision is contrary to the uniform treatment accorded public official/public figure issues in this Court, ANPA and ASNE wish briefly to set forth their views for the assistance of the Court.

WHEREFORE, the American Newspaper Publishers Association and the American Society of Newspaper Editors request this Court to grant this motion and permit them to file the Brief Amici Curiae attached hereto.

Respectfully submitted,

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") submit this brief amici curiae in support of Petitioner's, *Valley News*, Petition for Writ of Certiorari.

INTEREST OF THE AMICI CURIAE

As set forth in their motion for leave to file this brief, ANPA and ASNE have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged. This Court, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), established that the First Amendment mandated a constitutional privilege applicable to allegedly libelous publications concerning "public officials". Under that constitutional privilege, if a libel plaintiff could be classified as a "public official", then he was required to prove "actual malice" in order to recover in defamation litigation. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court also established that the

classification of libel plaintiffs as public officials/public figures or private individuals was a constitutional question resolvable only by the court.

In the case before the Court, the New Hampshire Supreme Court ruled that the public official question was a matter to be decided by the jury. It should be noted that the plaintiff in this case was the sheriff of Sullivan County, an elective office, from 1943 to 1966. At the time of the publication in question, he was a deputy sheriff under an appointment of his brother, then the sheriff. In his capacity as deputy sheriff, the plaintiff's duties consisted of serving process, interviewing complainants, doing investigative work, and acting as bailiff for the superior court. The plaintiff has served as president of the New Hampshire Sheriff's Association. In 1955, he organized the Sullivan County Peace Officers' Association. In the late 1930's, he was the president of the Permanent Fireman's Association, and in 1939 he authored a legislative bill providing for firemen's retirement. He has been active over the years in political campaigns and has spoken to service and women's clubs.

It is incredulous that any court, paying any attention to what this Court has said in this field, could make the findings made by the New Hampshire Supreme Court. It is obvious that this Respondent is a public official and that no court should abnegate its responsibility to a jury for a ruling in a case of this nature. Since the decision of the New Hampshire Supreme Court is so contrary to the law as settled by this Court and followed by the lower federal and state courts, ANPA and ASNE desire to present to this Court, for its assistance, their views in respect to the important issues placed before this Court by the Petition for Writ of Certiorari.

ARGUMENT

THE ISSUE AS TO A LIBEL PLAINTIFF'S PUBLIC OFFICIAL/PUBLIC FIGURE STATUS IS A QUESTION OF LAW NOT APPROPRIATE FOR CONSIDERATION BY A JURY.

In the instant case, the New Hampshire Supreme Court affirmed the trial court's determination that the question as to whether the Respondent was a public official was a matter for determination by the jury at trial. Not only is this decision contrary to the opinions of the vast majority of courts which have addressed this issue, but it is also contrary to the uniform treatment accorded the issue in this Court.

Both the trial court and the New Hampshire Supreme Court concluded that there existed genuine issues of material fact with respect to Respondent's status as a public official and, therefore, that Petitioner was not entitled to summary judgment. Yet, neither court was able to point to any fact which was in dispute. Indeed, the recitation of the Respondent's official positions and duties by the New Hampshire Supreme Court (Petition for Ceriorari, Appendix at 7a) is without qualification and represents the undisputed facts which were before the court. A close reading of the New Hampshire Supreme Court's opinion demonstrates that the court suffered from the misapprehension that summary judgment in libel cases could only be had where there were no disputed facts as to *any* issue and complete judgment could be entered for one of the parties. Analysis of this Court's decisions and numerous state and federal decisions demonstrates that partial adjudication, *by the court*, on the public official issue is the rule and is a question which "should be answered as soon as possible" in defamation cases. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied*, ____ U.S. ____, 68 L.2d 238 (1981).

The rule was first announced by this Court in *Rosenblatt v. Baer*, 383 U.S. 75 (1966). There, this Court reversed a jury verdict which had been rendered prior to the landmark decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In

attempting to provide some guidance to the trial court on remand concerning the public official issue, this Court held: "it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official' ". 383 U.S. at 88. On numerous occasions since *Rosenblatt*, this Court has ruled on the public official/public figure issue, as a matter of law, even in cases which had not yet gone to trial. See e.g., *Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In none of these cases has the Court suggested that resolution of the public official/public figure question should be left to the jury, as did the New Hampshire Supreme Court in the instant case. The consistent approach of this Court in ruling on public official/public figure questions as a matter of law reflects this Court's inherent approval of the rule that such questions must be decided by the trial judge and not the jury.

This also is the rule which has been announced and followed by virtually all federal and state courts which directly have addressed the question. See, *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978) and cases cited therein. Especially in cases where the facts are undisputed as to a libel plaintiff's "status", the courts have held that summary judgment is appropriate; and, it has been suggested that "[e]ven if summary judgment were improper because of issues of fact that could only be resolved after evidentiary hearing, the trial court, not a jury, must determine whether the evidence showed that plaintiff was a public figure." *Rebozo v. Washington Post Co.*, 637 F.2d 375, 379 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3023 (U.S. July 27, 1981) (No. 81-173); see also, *Burns v. The Times Argus Association, Inc.*, 430 A.2d 773 (Vt. 1981) (libel plaintiff's "status" is a "constitutional" issue which must be decided on motions for summary judgment or directed verdict).

The reasons for withdrawing public official/public figure inquiries from the jury are twofold: first, under *New York Times v. Sullivan, supra*, the public official issue is a constitutional question which may only be resolved by the court; second, "[s]uch a course will both lessen the possibility that a jury will

use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." *Rosenblatt v. Baer, supra* at 88, n.15. Not only does resolution of the constitutional question by the court guard against the unreviewable effects of possible jury prejudice, but it also avoids the problem of forcing a jury to make the decision without the opportunity (available to a judge) to sift through the reported cases and consider the particular facts and nuances of the various statements of the standard. As noted by the United States Court of Appeals for the District of Columbia Circuit:

> [A] jury of laymen is hardly qualified to apply the nice and sometimes intricate distinctions between public and private figures which have been developed in the cases following *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Application of those rules and distinctions is analagous to a court's ruling on the question of probable cause for a search and seizure, a matter which of course is for the court and not the jury.

Wolston v. Reader's Digest Ass'n, Inc., 578 F.2d 427 (D.C. Cir. 1978), *rev'd. on other grounds*, 443 U.S. 157 (1979).

The New Hampshire Supreme Court failed to pay heed to the constitutional nature of the public official/public figure issue and also ignored the important policy considerations underlying the rule that this particular issue must be decided by the court and not the jury. This error of the New Hampshire Supreme Court was compounded by its failure to hold that Respondent is a public official as a matter of law.

THE RESPONDENT, A LAW ENFORCEMENT OFFICER, WAS A PUBLIC OFFICIAL AS A MATTER OF LAW

Lying at the very core of the values protected by the First Amendment is the notion that debate on significant public issues and government affairs should be "uninhibited, robust,

and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965). As Justice Brandeis noted, those who won our independence believed that "public discussion is a political duty; and this should be a fundamental principle of American government." *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion). Recognizing that the right to criticize the activities of the government is inseparable from the right to criticize the actions of public officials, this Court in *Sullivan* imposed the stringent standard of "actual malice" on public officials who sought to recover in libel for defamatory false statements directed against them.

The decisional authorities of this court and of numerous state and federal courts leave no doubt that law enforcement officiers must be considered public officials within the purview of *New York Times v. Sullivan*. The plaintiff in that landmark case was a city commissioner who was charged with supervising the police department.

Since *New York Times*, it has been judicially recognized that police officers bear a unique responsibility to the public. They are charged with the gravest public trust—that of executing the law. They are the quintessence of state action, affecting the public on the most elemental level. They are required to physically apprehend suspects. Most are armed and they are all too frequently called upon to utilize deadly force in the line of duty. Their conduct affects the very lives of the populace. They clearly "have or appear to have, substantial responsibility for the conduct of government affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1965).

Because of their unique position in the American system of government, police officials must be subject to the highest degree of scrutiny. The public and the press must be free to critize their conduct within the limits of the "actual malice" rule.

This Court implicitly recognized this principle in *St. Amant v. Thompson*, 390 U.S. 727 (1968). There, as here, the plaintiff

was a deputy sheriff. This Court adopted, without comment, the ruling of the lower court that a deputy sheriff was a public official within the scope of the definition established in *Rosenblatt*.

In *Henry v. Collins*, 380 U.S. 356 (1965), this Court again accepted without question the legal determination of the lower court that the plaintiff, a chief of police of the small community of Clarksdale, Mississippi, was a public official.

Following the lead of the Court, the lower federal and state courts have spoken virtually with one voice in holding that law enforcement officers are public officials as a matter of law. In *Pape v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966), the Seventh Circuit rejected the argument that only elected officials should be required to show actual malice. The court relied on *Henry v. Collins, supra*, in holding that a deputy chief of detectives and lieutenant of police was a public official.

The Seventh Circuit addressed this question again in a more recent case. In *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977) the court ruled that:

> Where a position in government has such apparent importance that the public has an independent interest in the qualification and performance of the person who holds it, beyond the general public interest in all government employees, . . . the *New York Times* malice standard applies.

563 F.2d at 352, *citing, Rosenblatt v. Baer*, 383 U.S. at 83.

The court went on to hold:

> The public is certainly interested in an important and special way in the qualifications and performance of federal agents, such as defendants here, where decisions to search and to arrest directly and personally affect individual freedoms. We need not fear, as the defendants contend, that holding them to be public

> officials will make the terms 'public official' and 'government employee' synonymous. Each case will have to be decided on its own facts . . .

563 F.2d at 352.

The Court in *Meiners* clearly recognized the unique position occupied by law enforcement officers and the vital public interest in their performance in office.

Perhaps the strongest and most articulate judicial statement concerning the public official status of police officers appears in an opinion by the Tenth Circuit, decided on August 7, 1981.

> We agree with the trial court that Gray's status as a police officer in Rock Springs made him a public official. Street level policemen, as well as high ranking officers, qualify as public officials under the test of *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966). They "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *id.* at 85, and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. . ." *Id.* at 86. The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.

Gray v. *Udevitz*, No. 79-1739, slip op. 8-9 (10th Cir. Aug. 7, 1981).

The vast majority of state courts have similarly held that law enforcement officers at all levels are "public officials"

within *New York Times*. In *McClain v. Arnold*, 270 S.E.2d 124, 125 (S.C. 1980), the Supreme Court of South Carolina held:

> . . . [T]he status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context. *Fadell v. Minneapolis Star Tribune Co., Inc.*, 425 F. Supp. 1075, 1083 (N.D. Ind. 1977), *affirmed*, 557 F.2d 107 (7th Cir. 1976); Handbook of Free Speech and Free Press by Barron & Dienes, page 275. Accordingly, we hereby join the majority of jurisdictions which have denominated police officers as "public officials" within the meaning of the *New York Times* doctrine.

There are several cases specifically holding that a deputy sheriff is a public official. The most recent also emanates from South Carolina. In *Phillips v. Independent Publishing*, the court discussed with particularity the public official status of a deputy sheriff stating:

> Directly on the point, holding that a deputy sheriff is a public official and therefore within the *New York Times* rule, see *Ammerman, et al. v. Hubbard Broadcasting, Inc.*, et al, 572 Pac. Reporter 2d 1258 (1977): The Court held that a deputy sheriff is a public officer, especially where he takes an official oath of office. South Carolina requires a similar oath by Section 23-13-20, South Carolina Code of Laws, 1968. In addition, Section 23-13-50 states that deputies may perform any and all duties appertaining to the office of his principal.

5 Med. L. Rptr. 1597, 1599 (S.C. Ct. of Common Pleas, 1979).

In another recent North Carolina case, the Court held as follows:

> The deputy is a representative of the sheriff in his official capacity. He is a public officer whose authority and duties are regulated and prescribed by law.

> The public generally regards the acts of a deputy sheriff as the acts of the sheriff himself. The sheriff's position in government vests in him and his deputies 'substantial responsibility for or control over the conduct of governmental affairs'. This is certainly true where law enforcement and police functions are concerned. Additionally, though the office of deputy sheriff may be a comparatively low ranking one in the hierarchy of government, nevertheless, if the deputy's office be abused, it has great potential for social harm and thus invites independent interest in the qualifications and performance of the person or persons who hold the position.

Cline v. Brown, 210 S.E.2d 446, 449 (N.C. App. 1975).

A number of other courts have held that police officers clearly constitute public officials within the *Rosenblatt* formulation. In *Gilligan v. King*, 48 Misc.2d 212, 264 N.Y.S.2d 309, (1965), an off-duty police lieutenant who shot a person, allegedly in self-defense after seeing the injured person pursuing a third party with an open blade, was held to be a public official. The court stated: "It is not the title of his office but the duties with which the particular office sought to be made to respond in damages is entrusted" that provides the privilege. 264 N.Y.S.2d at 313-14 (1965).

More recently *Moriarity v. Lippe*, 162 Conn. 371, 294 A.2d 325, 330-31 (1972) held that a patrolman was a public official within the ambit of the *New York Times* rule because his position vested in him a great potential for public harm stating: "Although a . . . low-ranking governmental official, a patrolman's office, if abused, has great potential for social harm and thus invites independent interest in the qualifications and performance of the person who holds the position." 294 A.2d at 330-31.

Similarly, in *Scelfo v. Rutgers University*, 116 N.J. Super. 403, 282 A.2d 445, 449-50 (1971), the court held two mounted policemen to be public officials because of their apparent authority over the conduct of governmental affairs and the

public's dependence upon proper performance of their important functions:

> As mounted policemen of the Newark police force, plaintiffs perform governmental duties directly related to the public interest and "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs", *Rosenblatt v. Baer*, 96 S.Ct. at 676. The alleged defamatory statements made by defendant related to the discharge of official duties of patrolmen assigned to the demonstration.

282 A.2d at 499-50.

Again, in *Coursey v. Greater Niles Township Corp.*, 40 Ill.2d 237, 239 N.E.2d 837, 841 (Ill. 1968), the court applied the foregoing principles in holding a patrolman to be a "public officer". In overruling an intermediate appellate court's determination that a patrolman, although conceded to be "an important symbol of government", was the "lowest in rank of police officials" and thus was not a public official, the Illinois Supreme Court stated:

> It is our opinion that the plaintiff is within the "public official" classification. Although as a patrolman he is "the lowest in rank of police officials" and would have slight voice in setting departmental policies, his duties are peculiarly "governmental" in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an "on the street" level than in the qualifications and conduct of other comparably low-ranking governmental employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws.

Your amici strongly endorse the courts' recognition of the critical distinction between the "governmental" as opposed to the "proprietary" function of law enforcement officers.*

As pointed out above, law enforcement is the most basic "governmental" function. Criticism of police conduct is therefore entitled to the highest level of First Amendment protection. While a junior government employee engaged in a purely "proprietary" activity might not be deemed a public official, the respondent, a law enforcement officer for many years, the chief such officer in his State and the bailiff of the Court of Record for both criminal and civil suits in the primary community in his state, clearly is.

Two additional cases have held that a police patrolman is a public official. See *Malerba v. Newsday*, ____ A.D.2d. ____, 4 Med.L.Rptr. 1110 (N.Y. App. 1978); *Orr v. Lynch*, 60 A.D.2d 949, 3 Med.L.Rptr. 2047 (N.Y. App. 1978).

From the foregoing, it is clear that the overwhelming weight of authority supports the proposition that all law enforcement officers, even those at the very lowest levels, must be considered public officials under *New York Times v. Sullivan*. In reaching this conclusion, this Court and other courts have universally recognized the critical governmental function performed by law enforcement officers and the grave public interest engendered as a consequence.

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* Federal courts in other contexts have recognized that the distinction has First Amendment implications. Anti-trust cases decided under the *Noerr-Pennington* doctrine have consistently held that attempts to influence "governmental" agencies are First Amendment protected while anti-competitive activities aimed at "proprietary" agencies are not. *See, e.g., George S. Witten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971).

CONCLUSION

For the reasons stated herein and for the reasons advanced by Petitioner *Valley News*, it is respectfully urged that the Petition for a Writ of Certiorari to the New Hampshire Supreme Court be granted.

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